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No. 85-1370 (1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

MOTION OF THE TIMES MIRROR COMPANY AND NEWSWEEK, INC. FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

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The Times Mirror Company and Newsweek, Inc. move for leave to file the attached brief amici curiae in this case. The consent of the attorneys for the appellant

has been obtained. Amici are informed that the attorney for the appellee refuses to consent to the filing of any briefs amici curiae in support of the appellant.

The Times Mirror Company ("Times Mirror") owns and operates the Los Angeles Times, the daily newspaper with the largest circulation in California, the Denver Post in Colorado, the Hartford Courant in Connecticut, Newsday in New York, and other daily newspapers, as well as various magazines, various cable television systems, and four television stations. Times Mirror has a direct interest in the outcome of this action because it is presently a party to a case pending in the Los Angeles Superior Court which raises issues similar to the case at hand, namely, whether differential taxation of different media is unconstitutional. (Times Mirror, et al. v. City of Los Angeles, Los Angeles Superior Court No. C 511941.)

Newsweek, Inc. ("Newsweek") is the publisher of a weekly national news magazine. Newsweek also has a direct interest in the outcome of this litigation because it is presently a party to a case pending in the Davidson County Chancery Court, Tennessee, in which one of the issues is the constitutionality of differential tax treatment of the media. (Newsweek, Inc. v. Celauro, Davidson County Chancery Court No. 86-1250 II.)

In addition, both Times Mirror and Newsweek, have a strong interest in preventing the government from exercising its taxing power in a manner that infringes upon their First Amendment rights. The Arkansas Supreme Court's decision, by permitting unequal tax treatment of different media in that state, provides the government with a weapon which may be used discriminatorily against media entities critical of the government or which may be

used to reward media organizations which publish material of which the government approves. Such discrimination constitutes a real and direct threat to the First Amendment rights of amici curiae. A clear directive from this Court is required to prevent state and local governments from enacting similar laws which discriminate between the media.

Amici curiae's brief will focus on the constitutionality of such disparate tax treatment of different media. Amici are informed that neither the appellant's brief, nor those of other amici, will deal directly with this critical issue. Amici understand that appellant's brief will focus on Arkansas' discrimination between different magazines based on their contents, as well as on Arkansas' discrimination between different members of the same media, namely, magazines. Amici's brief focuses on Arkansas' discrimination between different

media, e.g., newspapers, who are exempt from Arkansas' tax, and other media, e.g., book publishers and the electronic media, that are not exempt from Arkansas' tax.

Therefore, The Times Mirror Company and Newsweek, Inc. respectfully request this Court to grant their motion for leave to file a brief amici curiae in this matter.

DATED: August 1, 1986.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE TIMES MIRROR COMPANY AND NEWSWEEK, INC. IN SUPPORT OF APPELLANT

INTERESTS OF AMICI CURIAE

Amici curiae are media organizations with a direct interest in the outcome of this litigation, as fully set forth in their

motion for leave to file a brief amici curiae, supra.

SUMMARY OF ARGUMENT

The Arkansas law in question exempts all newspapers and all publishers of "religious, professional, trade and sports journals" from its state sales tax.

This Court has twice held that tax laws which discriminate between the same type of media, in both cases between large and small newspapers, are impermissible under the First Amendment to the United States Constitution, because the government cannot adopt tax laws that may censor its critics or that may reward its supporters. Grosjean v. American Press Co., 297 U.S. 233 (1936) and Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S 575 (1983). Tax laws which discriminate between different types of media are also impermissible for the same reason:

permitting the government to differentially tax different types of media would allow political favoritism and the imposition of special burdens on disfavored media. To guard against this government censorship, differential taxation of the media, whether based upon the size or the type of media, cannot be permitted absent a compelling state justification. The government simply has no right to enhance the voices of some members of the media by not taxing them, absent a compelling state interest. Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

No justification has been or can be offered for the differential treatment of newspaper and certain magazine publishers under Arkansas' tax law. The only interest which might be assumed, the interest of the state in raising revenue, has already been determined by this Court to be completely

inadequate to justify such discrimination. Minneapolis Star, supra. The Arkansas tax law must therefore be invalidated as a violation of the First Amendment.

3.

ARGUMENT

The Arkansas tax law exempts newspapers and publishers of "religious, professional, trade and sports journals" from its state sales tax. Ark. Stat. Ann. §§ 84-1904(f) and (j). Thus, all newspapers and some magazines are exempt from Arkansas sales tax, while all other media are subject to it.

A. DISCRIMINATION BETWEEN DIFFERENT MEDIA ACTIVITIES IS IMPERMISSIBLE UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

There are two decisions of this Court which have dealt directly with discriminatory taxation of the media. In Grosjean v. American Press Co., 297 U.S. 233 (1936), this Court invalidated a license tax

imposed by the State of Louisiana on the gross receipts from the sale of advertising by all newspapers with a weekly circulation above 20,000 copies. This Court unanimously found that the license tax, which differentiated between large and small newspapers, was unconstitutional under the First Amendment./1/

In 1983, this Court again reviewed the constitutionality of a tax law which provided for differential tax treatment of large and small newspapers. Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). By a 7-2 vote, this Court held that where such disparate treatment of the press was without

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1/ Imposition of this tax was apparently motivated by Senator Huey Long's desire to punish newspapers which had published unflattering statements about him. This Court noted that "hostile purpose" in striking down the offending tax. 297 U.S. at 250. However, this Court has made it clear that an improper purpose is not a requirement for a finding of unconstitutionality, infra.

a compelling justification, the tax law must be found unconstitutional under the First Amendment to the United States Constitution. The rationale applied by this Court in Minneapolis Star is fully applicable here.

Minneapolis Star involved a Minnesota state tax on the cost of paper and ink products consumed in the production of a publication. Prior to 1971, the Minneapolis Star & Tribune Co., a newspaper publisher, was exempt from Minnesota's sales and use tax provisions. In 1971, however, the Minnesota Legislature eliminated the exemption for newspapers from the use tax, and adopted provisions taxing ink and paper used in publications. This tax was later amended to exempt the first $100,000 worth of ink and paper consumed. As a result of that exemption, "only a handful of publishers" paid any tax at all, and even

fewer paid "any significant amount of tax." 460 U.S. at 591.

In contrast to Grosjean, there was no evidence that the Minnesota Legislature adopted this special use tax for any impermissible motive or to censor the media. 460 U.S. at 580. As this Court noted, however: "[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment." This Court added that "[w]e need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax." 460 U.S. at 592. Thus, evidence of an improper motive is not a sine qua non for a finding that Arkansas' tax is unconstitutional.

This Court, of course, recognized that "[i]t is beyond dispute that the State and the Federal government can subject newspapers to generally applicable economic regulations without creating constitutional

problems." 460 U.S. at 575. Nonetheless, this Court found that the Minnesota tax law did not fit within this general principle:

> Minnesota, however, has not chosen to apply its general sales and use taxes to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. . . . A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest.

460 U.S. at 581-82 (emphasis added).

The Arkansas Supreme Court relied on the rule that the press is not exempt from general taxes in upholding Arkansas' differential state tax. Ragland v. Arkansas Writers Project, 287 Ark. 155, 698 S.W.2d 802, 803 (1985). This completely misses the point made in the above-cited passage of

Minneapolis Star. Where only "certain publications" are subject to a tax or other economic regulation, the tax or regulation is no longer a "generally applicable economic regulation," so the tax or regulation violates the First Amendment unless a compelling state interest can be shown for the differentiation./2/ This is precisely the situation in Arkansas, where newspapers and some magazines are exempt from the tax, but other magazines and other media are not.

In Minneapolis Star, this Court explained in great detail the dangers which can arise from differential treatment of the press, particularly where a powerful

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2/ In section 3(C), infra, we demonstrated that Arkansas has offered no justification, compelling or otherwise, for its differential treatment of various media.

government tool such as the taxing power is utilized:/3/

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if

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3/ This Court has repeatedly recognized the potentially devastating effects which can accompany use of the taxing power, beginning with the oft-quoted phrase from McCulloch v. Maryland, 4 Wheat 316, 431 (1819): "the power to tax involves the power to destroy." See also Massachusetts v. United States, 435 U.S. 444, 455-56 (1977) ("a tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise"); Speiser v. Randall, 357 U.S. 513, 518 (1957) ("[i]t is settled that speech can be effectively limited by the exercise of the taxing power").

> it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. . . .
>
> Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to the suppression of expression, and

such a goal is presumptively unconstitutional.

Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

460 U.S. at 585 (footnote and citations omitted; emphasis added). This Court therefore invalidated Minnesota's special use tax on the grounds that its structure alone violated the First Amendment rights of the newspaper. 460 U.S. at 591-92.

Although Minneapolis Star dealt with differential tax treatment of newspapers based upon their size, its rationale applies to Arkansas' differential treatment of

certain magazines based upon the subject matter of the magazine and newspapers, by exempting all of these media from its state sales tax. Permitting such differential taxation allows the government to "reward" or "punish" a particular type of media based upon whether that type of media portrayed the government favorably or unfavorably. By thus "singling out" certain elements of the press, the Arkansas tax statute permits the government to "destroy a selected group . . . by burdensome taxation." See also Grosjean, 297 U.S. at 250-51.

Furthermore, the "political constraints that prevent a legislature from passing crippling taxes" are absent where a tax is applied only to the media or only to certain elements of the media, e.g., a type of media, like newspapers, or members of one type of media, like some magazines. Uniform taxes provide "political constraints" because the taxes fall on all taxpayers, who

will protest unfairly burdensome taxes. Where only the media, or particularly where only some elements of the media, are taxed, there will be no general outcry and the government can act with virtual impunity.

The principle that differential treatment of different media is unconstitutional has a long history. This doctrine was articulated by this Court over three decades ago in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951). In Burstyn, a state law forbid the commercial showing of any motion picture without a license, and a license could be denied for showing "sacreligious" films. The government defendants argued that even though prior restraints against newspapers were clearly unconstitutional, such restraints were permissible against motion pictures. This Court easily rejected that argument:

> Each method [of expression] tends to present its own peculiar

> problems. But the basic principles of freedom of speech and of the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

343 U.S. at 503 (emphasis added)./4/

Lower federal and state courts have consistently applied this doctrine to strike down regulations which were applied

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4/ Of course, "[e]ach method [of expression] tends to present its own peculiar problems," e.g., different problems arise in regulating loudspeaker trucks or billboards than arise with respect to the electronic media. These distinctions arise from inherent differences in the technology involved and will justify some differential treatment of different media. However, no such differences are even asserted, nor could they be, to justify Arkansas' differential taxation of different media.

differentially to different media. See, e.g., Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission, 593 F.2d 1102, 1123 (D.C. Cir. 1978) (striking down FCC regulations which required certain administrative actions to be taken by noncommercial, but not commercial, broadcasters); Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 663 (N.D. Ohio 1968), aff'd sub nom. Wonderland Ventures, Inc. v. Sandusky, 423 F.2d 548 (6th Cir. 1970) (invalidating municipal ordinances which applied different regulations to a community antenna television system than those applied to other broadcasters); City of Alameda v. Premier Communications Network, Inc., 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, cert. denied, ___U.S. ____, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984) (invalidating municipal tax ordinance which placed a higher tax

burden on subscription television services than was placed on other businesses).

This reasoning is clearly applicable here. The "basic principles of freedom of speech and of the press" apply equally to magazines, newspapers, and all other media, e.g., television stations, books, and radio stations. Differential taxation of different types of media therefore is unconstitutional absent a compelling state justification.

B. THE FIRST AMENDMENT DOES NOT PERMIT THE GOVERNMENT TO ENHANCE THE SPEECH OF SOME AT THE EXPENSE OF OTHERS.

By exempting newspapers and certain magazines from its tax, while imposing its tax on all other types of magazines and all other media, the Arkansas tax law also subsidizes some members of the press at the expense of the others. Such disparate treatment is unconstitutional.

This Court has held that the government may not enhance the speech of some elements of society at the expense of others. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court applied that principle in striking down provisions of the Federal Election Campaign Act which restricted the ability of certain groups and individuals to influence elections by their contributions. This Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

Id. at 49 (emphasis added; citations omitted). This holding was explicitly reaffirmed two years later in First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978), where this Court struck down a statute which prohibited political contributions to referendum measures by businesses or corporations./5/

Similar considerations apply here. By providing exemptions to magazines which deal with certain subject matters and to newspapers, the Arkansas tax law is "enhancing the voice" of those publications at the "expense" of the remaining magazines and other media, e.g., book publishers, which must bear a tax burden not imposed on the exempted publications.

5/ This issue was raised in Minneapolis Star, but was not reached by this Court. 460 U.S. at 593 n.17.

Moreover, even where a tax on the media or some members of the media is asserted to be "favorable" in comparison to that imposed on other businesses, a differential tax cannot be permitted. This Court has acknowledged that the judiciary is not well equipped to evaluate the true economic impact of differential tax laws, and is therefore unable to effectively compare relative "burdens" produced by differential taxes:

> [C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent

> in the proposed rule [permitting favorable differential tax of the media] poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility

460 U.S. at 589-90. Thus, where a differential tax on one media organization "enhances" the position of another, or even where the tax on the media is supposedly less than that on other businesses, differential taxes cannot be permitted absent a compelling governmental interest.

C. <u>ARKANSAS CANNOT DEMONSTRATE A STATE INTEREST, COMPELLING OR OTHERWISE, THAT JUSTIFIES ITS DIFFERENTIAL TAXATION OF THE MEDIA.</u>

As the preceding section sets forth, differential treatment of the press is presumptively unconstitutional. This Court has held that a heavy burden must be

met by the state in order to overcome this presumption:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendmdent that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

460 U.S. at 585 (emphasis added).

This requirement is consistent with this Court's earlier rulings that regulations which burden the exercise of First Amendment rights must always be strictly scrutinized. See, e.g., Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review"). Under this level of judicial

scrutiny, the traditional presumption of constitutionality is eliminated, and the government must prove that the classification in question is necessary and precisely tailored to achieve a compelling government interest. Globe Newspapers Co. v. Superior Court, 457 U.S. 595, 607 (1982). As this Court recently stated in Philadelphia Newspapers, Inc. v. Hepps, __ U.S. ___, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986):

> In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. . . .

106 S. Ct. at 1564 (citations omitted).

It is important to note that amici are not arguing that exemptions in specific tax

provisions are never permissible, even where a particular exemption may favor one media organization over another./6/ This Court's holding in Minneapolis Star and the above-cited authorities make it clear,

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6/ This Court's summary affirmances of two state court opinions in this area indicate that where an adequate justification is shown for a particular exemption, the exemption is permissible. See Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Co., 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed for want of a substantial federal question, ____U.S.____, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985); Chicago Tribune Co. v. Johnson, 106 Ill. 2d 63, 477 N.E.2d 482, appeal dismissed for want of a substantial federal question, ___ U.S.____, 106 S. Ct. 241, 88 L. Ed. 2d 250 (1985). Similarly, this Court noted in Minneapolis Star that its earlier opinions had permitted application of general laws to the media, even where exemptions were present, if those exemptions were justified by a sufficient government interest. 460 U.S. at 583 (citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); Associated Press v. NLRB, 326 U.S. 1 (1945)). These cases are inapposite here, however, where no justification at all for the exemption applied to some members of the media has been offered, let alone demonstrated.

however, that such exemptions are permissible only if there is a compelling state interest in disparate treatment of the media. See, e.g., 460 U.S. at 585.

Any contrary position would require this Court to effectively overrule its decision in Minneapolis Star. One of the primary bases for that decision was the government censorship and repression which would inevitably result from granting the government unlimited power to differentially tax different media organizations. 460 U.S. at 585. Requiring the government to provide a compelling justification for any exemptions or differentiation protects against this result, by guaranteeing that taxation cannot simply be imposed as a "punishment" for critical reviews of the government or removed as a "reward" for self-censorship by media organizations.

Despite this undeniable requirement, Arkansas has presented no justification

whatsoever, let alone a compelling one, for its exemption of newspapers under its tax law or for its differentiation between different magazine publishers. The only possible justification which may be offered is the raising of revenue, and this Court has already rejected that as an adequate justification for differential taxation:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: a state could raise the revenue by taxing businesses generally, avoiding the

> censorial threat implicit in a tax that singles out the press.

460 U.S. at 586 (footnote omitted).

This Court has held that a compelling justification is required to overcome the constitutional presumption against differential taxation of the media. Arkansas has failed to provide any justification at all for its differential tax law. Therefore, the Arkansas tax law must be invalidated.

CONCLUSION

In Minneapolis Star, this Court struck down differential tax treatment of First Amendment activities. This Court reasoned that, if differential taxation were permitted, the government could use its taxing power to punish some First Amendment activities while rewarding others. Similarly, in Buckley and Bellotti, this Court held that the government may not

restrict the speech of some elements of our society to enhance the relative voice of others. These concerns are equally applicable here.

Permitting the government to selectively favor newspapers and certain magazine publishers by exempting them from state taxes, while assessing a tax on other magazines and other media, "gives the government a powerful weapon against the taxpayer selected," which would permit it to "destroy" particular magazines and other media "by burdensome taxation." This differential treatment cannot be permitted to continue, absent a compelling justification. No justification whatsoever has been presented in this case.

Amici therefore respectfully request this Court to reverse the opinion of the Arkansas Supreme Court and hold that differential taxation of different types of media is impermissible under the First

Amendment absent a showing of a compelling state interest.

DATED: August 1, 1986.

Respectfully submitted,

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